endangered is common to many members of the community cannot change the ordinary principles of liability for fault.[22] The case is therefore one that can rest only upon *Fletcher* v. *Rylands*.[23] This then is one more situation where an acceptance of that case permits us to arrive at a decision different from the one that would have been arrived at in its absence.[24]

THE TANK CAR CASE. — In 1887, the date of the passage of the Interstate Commerce Act,[1] the purpose of government regulation was the prevention of the exorbitant and discriminatory rates and practices then on the rampage.[2] And the amendatory Hepburn Act of 1906 [3] pretended to do no more than make the original act a more efficient instrument of that purpose. But later, with the increase in commerce and trade, arose a demand for more adequate service. Recently this demand has become more and more insistent. Embargoes by the railroads and complaints by the shippers are making manifest the next point of contact between the railroads and the law. It is more and more clear that the limit of production is fixed by the transportation facilities.[4] Furthermore, it may fairly

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tween catastrophic and continuous escapes of substances, and of the reasons therefor see Jeremiah Smith, "Tort and Absolute Liability," *supra*, p. 324.

[22] The fact that a public interest is invaded by the condition of premises for which the defendant is responsible certainly throws on him a positive obligation to put them into shape, in spite of the fact that the condition arises from some force outside of his control, while it is rather clear that he has no such duty if all that is threatened is a private injury. Compare Y. B. 32 Assis. pl. 10; VINER, ABR. tit. Nusance, A; King *v.* Wharton 12 Mod. 510; Proprietors of Margate Pier & Harbor *v.* Margate, 20 L. T. (N. S.) 564; Attorney-General *v.* Heatley, [1897] 1 Ch. 560; and Northern Pacific Ry. Co. *v.* United States, 104 Fed. 691, with Sparke *v.* Osborne, 7 Comm. L. R. 51, and Reed *v.* Smith, 27 West. L. R. (Can.) 190. See, however, Smith *v.* Giddy, [1904] 2 K. B. 448; Roberts *v.* Harrison, 101 Ga. 773, 28 S. E. 995; 27 HARV. L. REV. 769. Such a distinction can be understood. But no case has been found which says that when defendant has done nothing and omitted nothing he is any more liable for accidents connected with his property when the interest interfered with is common to many persons than when it is not so. Barker *v.* Herbert, [1911] 2 K. B. 633, and Inhabitants of Shrewsbury *v.* Smith, 12 Cush. (Mass.) 177, seem to hold that there is no such distinction.

[23] The court understood this perfectly. In the course of the argument Gavan Duffy, J., inquired, "Is the meaning of the statute that the promoters may run a tramway at their own risk, or that they may run it provided they use reasonable care?" The answer was, "In general the promoters are free from liability if their works are in good order. . . . In the case of damage caused by the escape of electricity their liability goes farther and is absolute." [1916] Vict. L. R. 231, 240. The use of the language of nuisance in connection with this kind of a case is perhaps, in a British jurisdiction, justified by the cases of Midwood & Co. Ltd. *v.* Manchester Corporation, and Charing Cross, etc. Supply Co. *v.* London Hydraulic Power Co., *supra*, note 21.

[24] See E. R. Thayer, "Liability without Fault," 29 HARV. L. REV. 801, 802–13. It was apparently at one time thought in English courts that legislative authorization, whatever its effect on liability on other grounds, necessarily negatived liability under Fletcher *v.* Rylands. See Green *v.* Chelsea Waterworks Co., 10 T. L. R. 259. This opinion can hardly now be held.

[1] 24 STAT. AT. L. 379.

[2] See Texas & Pacific Ry. *v.* Interstate Commerce Commission, 162 U. S. 197, 233; New York, New Haven, etc. R. Co. *v.* Interstate Commerce Commission, 200 U. S. 361, 391. See also S. O. Dunn, "The Interstate Commerce Commission," 63 ANNALS AM. ACAD. OF SOC. AND POL. SCI. 155, 159.

[3] 34 STAT. AT L. 584.

[4] See an address by J. J. Hill on the "Need of Greater Railway Facilities," pub-

be said that the original purpose of regulation has been practically achieved,[5] and the annual crop of rebates and discriminatory practices may be likened to the natural weed-growth of a competitory system. The "danger-point" is shifting from these sources to the need of adequate service.[6] Consequently, the only public body devoted to railway supervision, the Interstate Commerce Commission, is turning into new fields of activity. This attempt has come to a head recently in the need for tank cars to carry oil in place of the barrel on a flat car. Hitherto the Commission has denied itself the power to require any particular form of service from the railroads.[7] Indeed, even in the more humanitarian field of safety devices, the Commission seems to have admitted its helplessness by asking for legislation.[8] But now the Commission has issued an order requiring the Pennsylvania Railroad to "furnish . . . tank cars in sufficient numbers to transport . . . normal shipments." [9] The Commission found that 91 per cent of the refined oil in the United States was transported in tank cars; that east of the Mississippi railroads own only about 3 per cent of these, the rest being privately owned; that the only other method of transporting oil, *i. e.*, in barrels on flat cars, was 3½ cents per gallon more expensive; and that the railroads and not the shippers should supply this facility.[10] It based its power mainly on section one of the Act: "and it shall be the duty of every carrier . . . to provide and furnish such transportation upon request." [11] An injunction was granted to the railroad by a federal court,[12] and this has just been affirmed unanimously by the Supreme Court.[13] The reasoning of the court was briefly: The Act had as its object the prevention of unreasonable and discriminatory rates and practices; the alleged power rests solely upon an implication from certain phrases that are more naturally explicable in a way more in consonance with the purpose of the Act; such a broad power cannot be permitted to rest upon such an implication; both Congress and the Commission have heretofore acted as if there was no such power. The demonstration is convincing, though with the Newlands Committee sitting to propose new legislation it is not probable that the

lished in the RAILWAY LIBRARY for 1912 on page 56. And the remarks of Mr. Thom before the Newlands Committee, now sitting, to be found on pp. 59–60 of the published hearings.

[5] See an address by C. A. Prouty, ex-Commissioner of Interstate Commerce, "Adequate Service and Facilities Obligatory," published in the RAILWAY LIBRARY for 1912, pp. 45, 47. See the article on the "Railways in the United States" by C. Colson, reprinted in the RAILWAY LIBRARY for 1912, pp. 20, 27.

[6] See C. A. Prouty, *supra*, p. 48.

[7] Scofield *v.* Lake Shore, etc. Ry. Co., 2 Int. Com. Rep. 90, 116; *Re* Transportation of Fruit, 10 Int. Com. Rep. 360, 373.

[8] See the TWENTY-SEVENTH ANNUAL REPORT OF THE COMMISSION, 82.

[9] Pennsylvania Paraffine Works *v.* Pennsylvania R. Co., 34 Int. Com. Rep. 179.

[10] For the economic situation, see pp. 180–84 of the decision.

[11] There were two dissents. The year before, in Vulcan Coal & Mining Co. *v.* Illinois Central R. Co., 33 Int. Com. Rep. 52, the Commission had required a railroad to supply an adequate number of coal cars. The only distinction between the two cases was that the former case dealt with adequacy in quantity while the latter dealt with adequacy in quality.

[12] Pennsylvania R. Co. *v.* United States, 227 Fed. 911. One of the three judges dissented.

[13] United States *v.* Pennsylvania R. Co., U. S. Sup. Ct., Oct. Term, 1916, Nos. 340 & 341.

decision will become a leading case. But the whole course of the question through the Commission and the courts presents a very suggestive illustration of the effect of economic needs on the one hand, and future legislation on the other, upon judicial construction. In the early years of the Commission's existence, with its original purpose in mind, it vigorously repudiated this power,[14] and from time to time it affirmed this position.[15] In 1909, about the time when the service was beginning to appear inadequate, the Commission expressly reserved its opinion upon the existence of the power.[16] And recently in two successive decisions it claims the power outright, first with three dissents,[17] next with only two.[18] But now arises the possibility of new legislation that will make liberal construction unnecessary. A federal court reverses these decisions, but there is one dissent.[19] And then the Supreme Court affirms this action unanimously.[20] The parallel is purely chronological, be it understood, but in so far, of interest.[21]

So the decision is not only good law, but an admirable expository argument for a much-needed clause in such new legislation as Congress may presently pass upon the advice of the Newlands Committee now sitting. For since adequate service is the watchword of the new era, just as rate regulation was of the old, Congress should use its undoubted power [22] to require it both in quantity and quality and should give the Interstate Commerce Commission, or whatever body may succeed it, the power to compel it.

But we must not let an imperative conception of law run away with us; a command and penalty are not omnipotent. A quantitative addition to facilities may be gained by increased efficiency,[23] but a qualitative improvement like tank cars necessarily costs money. In this case the money must be borrowed, and so takes the form of credit. And credit, so long as we retain private ownership, depends upon the private investor.[24] The private ownership of our railroads, however overlaid with governmental regulation, is still very substantially private in its reliance upon the private investor for capital. Therefore it behooves us to inquire carefully into the complaints of the railroads as to the

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[14] Scofield *v.* Lake Shore, etc. Ry. Co., *supra.*

[15] Rice *v.* Cincinnati, etc. R. Co., 5 Int. Com. Rep. 193, 212; Independent Refiner's Ass'n. *v.* Western New York, etc. R. Co., 5 Int. Com. Rep. 415, 433; Truck Farmers' Ass'n. *v.* Northeastern R. Co., 6 Int. Com. Rep. 295, 316; *Re* Transportation of Fruit, 10 Int. Com. Rep. 360, 373. An anomalous decision in which the power seems to have been actually exercised in effect, although no mention of it was made, must be mentioned. Preston *v.* Delaware, etc. R. Co., 12 Int. Com. Rep. 115. See 1 DRINKER, THE INTERSTATE COMMERCE ACT, § 268.

[16] Mountain Ice Co. *v.* Delaware, etc. R. Co., 15 Int. Com. Rep. 305, 322.

[17] Vulcan Coal & Mining Co. *v.* Illinois Central R. Co., *supra.*

[18] Pennsylvania Paraffine Works *v.* Pennsylvania R. Co., *supra.*

[19] Pennsylvania R. Co. *v.* United States, *supra.*

[20] United States *v.* Pennsylvania R. Co., *supra.*

[21] See J. C. GRAY, NATURE AND SOURCES OF THE LAW, §§ 385–86.

[22] Not only would a requirement of service seem a constitutional "regulation," but part of the common law duty of a common carrier is to keep its service abreast of the times. See 1 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 795–96.

[23] See the efforts of the Commission toward a better distribution of freight to prevent car shortage. THIRTIETH ANNUAL REPORT, 67–74.

[24] See W. Z. RIPLEY, RAILROADS: FINANCE AND ORGANIZATION, Preface, vi, vii.

difficulty of raising money and to investigate the reasons for those difficulties.[25]

CONGRESSIONAL POWER TO PUNISH FOR CONTEMPT. — It has been generally conceded that Congress has the power to punish certain contempts, but the courts have never finally determined the limitations on this power. A recent case has raised the question as to whether it extends to examinations preliminary to impeachment proceedings. The good faith of a committee of the House, deliberating on the propriety of preferring articles of impeachment against a United States District Attorney, was bitterly impugned by the accused in an open letter. The House found him guilty of contempt, and issued a warrant for his arrest; in pursuance thereof he was thrown into confinement. He applied for a writ of *habeas corpus*, but the court returned him to custody.[1]

Parliament has always had the general power to punish contempts;[2] this seems to be one of the judicial characteristics that have survived from the days when that body was clearly a court.[3] Other English legislative bodies, however, have never exercised such broad authority.[4] And it is certain that Congress has no such general prerogative;[5] those who seek to trace this right from analogies to Parliament as it existed at the adoption of the Constitution fail to recognize the fact that Congress was never a judicial body and that the judicial origin of Parliament is the basis of this power. English analogies lead nowhere.[6]

Whatever ability to punish contempts Congress may have must come from constitutional implications.[7] The Constitution requires that Congress legislate, and impliedly, it must be granted the power to secure itself against disorders or intimidation in its presence.[8] Just as any other

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[25] See, for instance, the argument of Mr. Alfred P. Thom before the Newlands Committee, now sitting, to consider future legislation. HEARINGS BEFORE THE JOINT COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, parts I–VII.

[1] United States *ex rel.* Marshall *v.* Gordon, 235 Fed. 422 (Dist. Ct., S. D., N. Y.).

[2] Brass Crosby's Case, 3 Wils. 188, 198.

" . . . the competence of the House of Commons to commit for a contempt and breach of privilege cannot be questioned." Burdett *v.* Abbot, 14 East 1, 149, *per* Lord Ellenborough, C. J.

[3] It is perfectly clear that Parliament originally was, and to some extent still is, a court. *Cf.* COKE, FOURTH INSTITUTE, 23. "All courts, by which I mean to include the two houses of parliament and the courts of Westminster-Hall. . . ." Brass Crosby's Case, *supra*, at p. 204, *per* Blackstone, J.

[4] Kielly *v.* Carson, 4 Moo. P. C. 63, 88, 92.

[5] Kilbourn *v.* Thompson, 103 U. S. 168, 197.

[6] See Kilbourn *v.* Thompson, 103 U. S. 168, 189.

[7] "Such [powers] as are not conferred by that instrument (the Constitution), either expressly or by fair implication from what is granted, are 'reserved to the States respectively, or to the people.' . . . There is no express power in that instrument conferred on either House of Congress to punish for contempts." Kilbourn *v.* Thompson, 103 U. S. 168, 182, *per* Mr. Justice Miller.

[8] Anderson *v.* Dunn, 6 Wheat. (U. S.) 204, 228. It is clear that Kilbourn *v.* Thompson, *supra*, does not overrule Anderson *v.* Dunn on this point, which is the true basis of the decision; the later case takes exception to *dicta* that are much more broad in their scope. See 1 STORY, CONSTITUTION, 5 ed., § 845 *et seq.*; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 191; CUSHING, LEGISLATIVE ASSEMBLIES, 2 ed., § 654. *Cf.* Burnham *v.* Morissey, 80 Mass. 226, 239, where it is said that the power to imprison for contempt is limited to cases where the power is necessarily implied from those constitutional functions and duties, to the proper performance of which it is essential.